

SB 307 – Transparency in Public Records Act of 2022

Public Records - Retention and Inspection - Communication

Senator Clarence Lam

District 12

Auto-deleting messaging applications



Telegram



Snapchat



Signal



WhatsApp

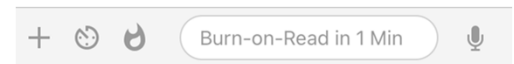
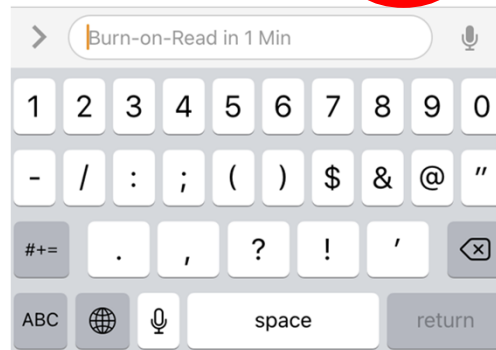
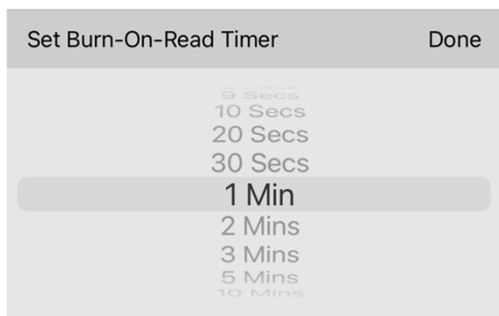
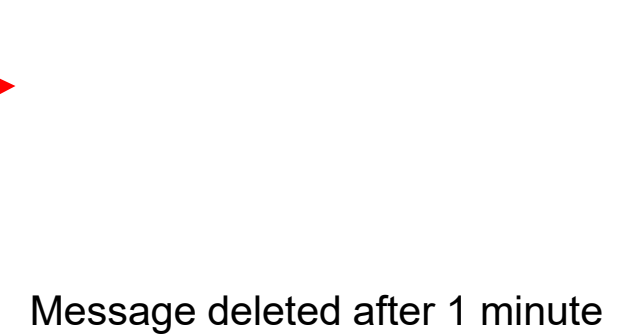
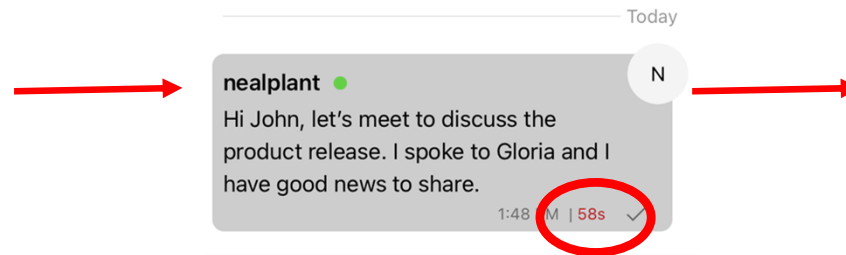
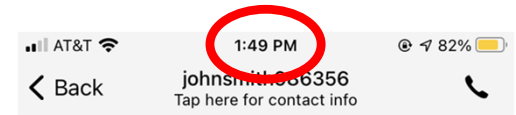
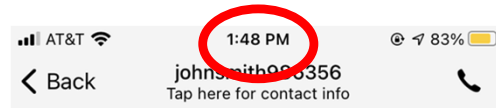
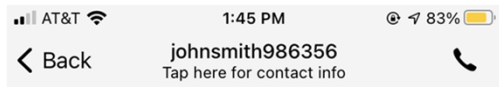


Wickr



Facebook Messenger

What is Wickr? How does it work?



Why are self-destructing messages like Wickr a problem?

- Maryland Public Information Act: records are presumed to be public, except:
 - Discourse under attorney-client privilege
 - Preventing invasion of personal privacy
 - Confidential executive communications that is advisory or deliberative in nature
 - Other very specific exceptions defined in statute

Law Requires Agencies to Have Records Retention Schedule

- Current statute: **every unit of state government must have a records retention and disposal schedule** that specifies how long each type of record must be kept
- Article – State Gov. §10–609: The State Archivist “shall adopt regulations to...set standards for the development of record retention and disposal schedules.”
- §10–610: the establishment and revision, in accordance with the regulations, record retention and disposal schedules to ensure the prompt and orderly disposition of records, including electronic records, that the unit no longer needs for its operation; [and] the transfer of permanent records to the custody of the Archives.
- First passed the Maryland General Assembly in 1984

Law Requires Agencies to Have Records Retention Schedule

Per the State Archives website and guidance to state agencies:

- Length of record retention depends more on its content than whether it's on paper or electronically (via email or Wickr or other medium).
- “Administrative correspondence” are communications sent in carrying out official agency functions and should be kept for a certain duration/years before destruction.
- “Executive correspondence” should be transferred to the State Archives for permanent retention.

Office of the Governor does not have a Retention Schedule

- The Governor's office contends:*
- 1. It is NOT a "not a unit of state government"
- 2. It is NOT conducting official business on Wickr
- Both are false.

*Source:

The Washington Post

Maryland Politics

Md. Gov. Larry Hogan's messages to state employees self-destruct in 24 hours

The app Wickr has provided the governor a forum to complain about media reports, direct pandemic response and coordinate with top staffers

By [Steve Thompson](#)

December 30, 2021 at 9:00 a.m. EST

False: Governor's office is not a unit of state government

- Per the Washington Post: the Governor's office contends the law does not apply to the Office of the Governor because it is not a "unit of the state government" but rather is the head of state government.

False: Governor is not conducting official business via Wickr

Statements of Mike Ricci, spokesperson for Gov. Hogan:*

- “the governor has used messaging apps to have political and communications conversations with advisers, many of whom do not work for the state.”
- Wickr messages described as: “fluid political and media, news of the day conversations.”
- Current law does not exempt: “political” or “news of the day” communications

*Source: Washington Post

Governor's Office is using Wickr to conduct public business

- Wickr messages show the Governor communicating on a range of public issues:*
- Public health crisis and pandemic response
- Governor directed staffers to limit public comments about Covid test supplies because of concerns it could lead to questions about his South Korean tests

“Stop talking about 1,000 f---ing tests!!!! Read what I say. Tests are unlimited,” the Governor wrote top staffers in a Wickr chatroom called “COVID-19”

“Why do we keep talking about such a small number of tests which begs the question where are the half million.” wrote the Governor in a Wickr message

*Source: Washington Post

Governor's Office is using Wickr to conduct public business

- Former Chief of Staff Roy McGrath indicted on federal and state charges due insistence of a full year's severance to leave the Maryland Environmental Service.
- **Governor wrote to McGrath via Wickr: "I know you did nothing wrong. I know it is unfair. I will stand with you"**

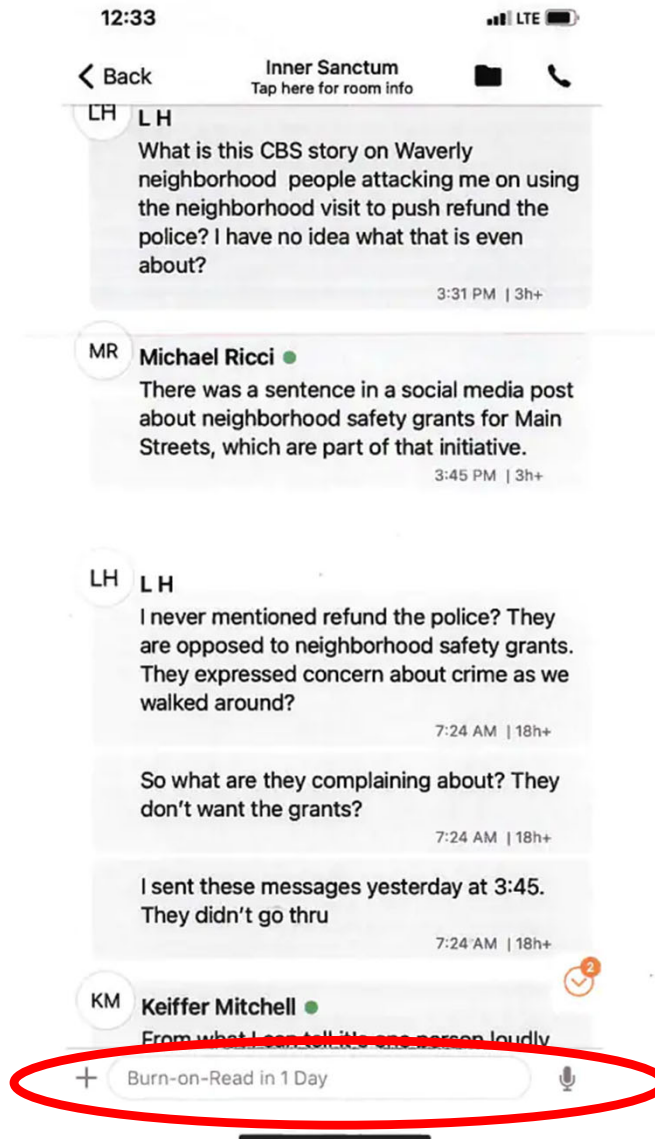
Source: Wickr message shared by Roy McGrath with the Washington Post

Governor's Office is using Wickr to conduct public business

- Not limited to “political” or advisors outside of state government
- Messages included his chief of staff, senior advisor, chief legislative officer, etc.
- Chat rooms labeled: “COVID-19,” “Executive Team,” “Inner Sanctum,” “Front Office”
- Public business: Governor requested information from staffers about how much Maryland stood to receive from the federal infrastructure package. Chief of Staff replied that it was not yet known.

The Governor used Wickr and its “burn-on-read” function, which destroys messages 24 hours after they were read, to communicate with top staffers on issues of public importance.

(Obtained through a PIA request by the Washington Post in Nov. 2021)



Hogan Administration's disregard of the law

- Current criminal law broadly prohibits a person, “except under proper authority,” from willfully altering, defacing, destroying, removing, or concealing a public record.
- A “public record” includes an official book, paper, or record, kept on a manual or automated basis, that is created, received, or used by a unit of: (i) the State; (ii) a political subdivision of the State; or (iii) a multicounty agency.”
- A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding \$1,000 or both.

Md. Code, Crim. Law § 8-606(b).

Id. § 8-606(a)(3). “Unit” is not defined in this title.

Id. § 8-606(c).

Hogan Administration's disregard of the law

Use of Private Servers and Emails does NOT remove them from public records:

- Although these communications may not have been conducted on official servers, the Office of the Attorney General, along with government bodies and officials across the country, have recognized that officials cannot evade open records laws by using private servers to conduct public business.

Private email and text messages on a private device are part of the public record:

- The Maryland Public Information Act Manual, published by the Attorney General's office, states plainly in reference to private email or text messaging on a private device, "if they are made or received by a custodian in connection with the transaction of public business, they are public record."

Maryland Public Information Act Manual (16th Ed.), 13, Office of the Attorney General (September 2021)
https://www.marylandattorneygeneral.gov/OpenGov%20Documents/PIA_manual_printable.pdf ("Manual"). Cf. *Competitive Enterprise Institute v. Office of Sci. and Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016); *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017).
Manual at pg. 1-6.

Is the Governor using taxpayer dollars to pay for Wickr?

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Expenditure Date	Payee Name	Address	Payee Type	Amount	Committee Name	Expense Category	Expense Purpose
02/25/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	113.31	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
03/25/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	105.90	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
04/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	125.00	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
05/29/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	180.02	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
06/21/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	180.02	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
07/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	194.27	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
08/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	217.96	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
09/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	239.14	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
10/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	254.15	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
11/25/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	254.15	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
12/23/2019	Wickr Inc	20 California Street, San Francisco, California 94111	Business/Group/Organization	239.23	Hogan, Larry for Governor	Rent and Other Office expenses	Office Supplies
01/23/2020	Wickr Inc	1459 18th Street, San Francisco, California 94107	Business/Group/Organization	265.67	Hogan, Larry for Governor	Rent and Other Office expenses	Utilities - Phone / Cell Phone
02/24/2020	Wickr Inc	1459 18th Street, San Francisco, California 94107	Business/Group/Organization	282.51	Hogan, Larry for Governor	Rent and Other Office expenses	Utilities - Phone / Cell Phone
03/23/2020	Wickr Inc	1459 18th Street, San Francisco, California 94107	Business/Group/Organization	291.94	Hogan, Larry for Governor	Rent and Other Office expenses	Utilities - Phone / Cell Phone

Governor's Office is not above the law

- **A records-retention schedule from the governor's office is “something we'd like to have.” – Elaine Bachmann, State Archivist, appointed June 2021**
- “My argument is the best society is one in which all information that is processed by government is publicly available, and that includes electronic records...To in any way try to eliminate communications that are part of the way in which government functions, or dysfunctions, is extraordinarily bad policy.” – Edward Papenfuse, State Archivist 1975-2013

Source: Washington Post